United States Court of Appeals
for the Eighth Circuit

No. 81-1862

White Earth Band of Chippewa Indians,

Appellee,

v.

Joseph N. Alexander, individually and as Commissioner of Natural Resources for the State of Minnesota and Fredean C. Hammer, Director of the Division of Enforcement and Field Service for the Department of Natural Resources

Counties of Mahnomen, Clearwater and Becker,

Appellants

Elmer H. Winter, Kenneth Albertson, Joe Klinkhammer, Ed Grahame,

United States of America,

Appellee

v.

State of Minnesota

No. 81-1833

White Earth Band of Chippewa Indians,

Appellee,

v.

Joseph N. Alexander, individually and as Commissioner of Natural Resources for the State of Minnesota and Fredean C. Hammer, Director of the Division of Enforcement and Field Service for the Department of Natural Resources

Counties of Mahnomen, Clearwater and Becker,

Appellants

Elmer H. Winter, Kenneth Albertson, Joe Klinkhammer, Ed Grahame,

United States of America,

Appellee

v.

State of Minnesota

No. 81-1861

White Earth Band of Chippewa Indians,

Appellant,

v.

Joseph N. Alexander, individually and as Commissioner of Natural Resources for the State of Minnesota and Fredean C. Hammer, Director of the Division of Enforcement and Field Service for the Department of Natural Resources

Appellees,

Counties of Mahnomen, Clearwater and Becker,

Appellees,

Elmer H. Winter, Kenneth Albertson, Joe Klinkhammer,

Appellees,

Ed Grahame,

United States of America,

v.

State of Minnesota,

No. 81-1862

White Earth Band of Chippewa Indians,

Appellee,

v.

Joseph N. Alexander, individually and as Commissioner of Natural Resources for the State of Minnesota and Fredean C. Hammer, Director of the Division of Enforcement and Field Service for the Department of Natural Resources

Counties of Mahnomen, Clearwater and Becker,

Elmer H. Winter, Kenneth Albertson, Joe Klinkhammer,

Appellants,

Ed Grahame

Submitted: January 13, 1982

Filed: May 14, 1982

Before HENLEY, Circuit Judge, GIBSON, Senior Circuit Judge, and McMILLIAN, Circuit Judge.

McMILLIAN, Circuit Judge.

This case presents appeals and cross-appeals from the district court's[1] granting of motions for issue preclusion and determination of the litigation on the merits. For partial reversal, the White Earth Band of Chippewa Indians argues that the district court erred in (1) ruling that four townships[2] had not been restored to the White Earth Reservation and (2) determining that the State of Minnesota could require "non-members"[3] hunting and fishing on Indian Lands with tribal permission to follow state limits and regulations. The state appellees, intervening counties and individual intervenors cross-appeal from the district court's order which precluded litigation of the disestablishment issue decided in State v. Clark, 282 N.W.2d 902 (Minn. 1979) (Clark), cert. denied, 445 U.S. 904 (1980). They argue that collateral estoppel is inapplicable because (1) there has been a significant change in the law and (2) the purposes of collateral estoppel are not met. For the reasons

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1. The Honorable Edward J. Devitt, United States Senior District Judge for the District of Minnesota.

2. Townships 146, 145, 144 and 143 North of Range 37 West.

3. "Non-member" is used instead of "non-Indian" because Indians who are not members of the Band are treated as non-Indians with regard to hunting, fishing, and wild rice gathering on the Reservation. See Washington v. Confederated Tribes of Colville, 447 U.S. 134, 161 (1980), rehearing denied, 101 S.Ct. 25 (1980).

discussed below, we affirm the judgment of the district court.

The facts underlying this appeal are not disputed. The district court thoroughly discussed the background of litigation, White Earth Band of Chippewa Indians v. Alexander, 518 F. Supp. 527 (D. Minn. 1981); therefore, only facts pertinent to this appeal will be reproduced here.

The White Earth Band is one of six Chippewa Bands comprising the Minnesota Chippewa Tribe. The White Earth Reservation was established by the treaty of March 19, 1867, and consisted of thirty-six townships. 16 Stat. 719, II Kappler 974 (ratified April 8, 1867). In 1889, Congress enacted the Nelson Act, 24 Stat. 642, I Kappler 301, one of a series of particularized allotment acts adopted after passage of the Dawes Act or General Allotment Act of 1887, 24 Stat. 388, I Kappler 33. On July 20, 1889, pursuant to the Nelson Act, the Band ceded their right and title to four northeastern townships. See note 2 supra. Following the Indian Reorganization Act of 1934, 48 Stat. 987, codified at 25 U.S.C. § 476, approximately 2,900 acres of the 92,000 acres of the four ceded townships were restored to trust status.

In 1974, the Band filed a complaint in federal district court against the State of Minnesota and certain state officials seeking declaratory and injunctive relief after numerous arrests of Band members for fishing and hunting violations within the White Earth Reservation. Three Minnesota counties, Becker, Clearwater and

Mahnomen (counties) and four individuals were allowed to intervene. The Band sought a declaration that (1) its members and Minnesota Chippewa Tribe members were entitled to hunt, fish, trap and gather wild rice without any interference, regulation, control or licensing by officials of the Minnesota Department of Natural Resources, and (2) the Band and Tribe had jurisdiction to regulate those activities by non-members within their Reservation. The district court consolidated the action with a suit filed by the United States against the State of Minnesota seeking to prohibit the state from enforcing its hunting, fishing, trapping and wild rice gathering laws (hereinafter gaming laws) against Band members on the Reservation.

The Band's action was held in abeyance by agreement of the parties and with court approval while several issues were litigated in state court regarding prosecutions of Band members for gaming laws violations on the Reservation. These prosecutions were consolidated on appeal before the Minnesota Supreme Court in Clark, 282 N.W.2d 902. The issue in Clark was whether the state had jurisdiction to enforce its gaming laws against Band members on non-Indian owned land within the thirty-two non-ceded townships within the Reservation. The court held (1) the Nelson Act did not disestablish the Reservation and therefore the state's jurisdiction was limited by 18 U.S.C. § 1162(b), Clark, 282 N.W.2d at 908; (2) the Indians have original rights to hunt and fish that were extinguished by the Treaty of February 22,

1855, 10 Stat. 1165, II Kappler 685, but were reacquired in the Treaty of 1867 and never thereafter extinguished, 282 N.W.2d at 908; and (3) the state lacks jurisdiction over Band members' hunting and fishing on the thirty-two townships within the Reservation, id. at 909.

Following the state court's decision in Clark, the district court granted the Band's motion to preclude further litigation of the disestablishment issue as it affected the thirty-two townships and issued a permanent injunction prohibiting the state from enforcing its gaming laws against Band members within the thirty-two townships. The state appellees, intervening counties, and individual intervenors[4] (hereinafter counties) challenge the preclusion order, arguing that a significant legal change renders collateral estoppel inapplicable and the purposes of collateral estoppel have not been met.

The district court also made the following findings: (1) the original thirty-six township Reservation has been diminished by cession of the four northeastern townships, White Earth Band v. Minnesota, 518 F.Supp. 534, citing United States v. Minnesota, 466 F. Supp. 1382 (D. Minn. 1979), aff'd sub nom. Red Lake Band of Chippewa Indians v. Minnesota, 614 F.2d 1161 (8th Cir.), cert. denied, 449 U.S. 905 (1980); (2) the Band may prohibit or condition entry onto Indian-owned or trust

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4. The State of Minnesota joined the appeal only to preserve its position from res judicata if the counties' position is adopted.

land within the Reservation by issuing permits or charging permit fees, but may not proceed against non-members in tribal courts, White Earth Band v. Minnesota, 518 F. Supp. at 535; and (3) the state could enforce its gaming laws against non-members on Indian-owned and trust lands, id. at 538. On appeal the Band challenges the first and third findings. The Band argues that the district court erred in holding that the four northeastern townships are not part of the Reservation because (1) authority to restore the four townships to reservation status is contained in the Indian Reorganization Act; (2) this case is distinguishable from United States v. Minnesota, 466 F. Supp. 1382; and (3) "checkerboard jurisdiction" is impractical and contrary to Congress' intent. The Band also argues that the district court erred in determining the state's authority to require licenses of non-members hunting on Indian land because the issue is not ripe for consideration.

I. Issue Preclusion

The collateral estoppel doctrine "has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979), citing Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 328-329 (1971).

In the present case the parties agree that the technical requirements of collateral estoppel are satisfied

pursuant to the four-part analysis of Oldham v. Pritchett, 599 F.2d 274 (8th Cir. 1979). According to the Oldham court, collateral estoppel is appropriate where:

> (1) the issue . . . [is] . . . identical to one in a prior adjudication; (2) there was a final judgment on the merits; (3) the estopped party was a party or in privy with a party to the prior adjudication; and (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.

Id. at 279.

However, the counties claim that application of the doctrine of collateral estoppel would be both unjust and against the underlying public interest. The Supreme Court has granted trial courts broad discretion in determining whether offensive collateral estoppel should be applied. Parklane Hosiery Co. v. Shore, 439 U.S. at 331.

The counties first argue that the disestablishment issue is a legal issue and that there has been a significant change in the law so as to render the rule of collateral estoppel inapplicable, citing Commissioner v. Sunnen, 333 U.S. 591, 600 (1948). In support the counties assert that the Clark court relied upon Leech Lake Band of Chippewa Indians v. Herbst, 334 F. Supp. 1001 (D. Minn. 1971), to find that the underlying purpose of the Nelson Act was not disestablishment, but that after DeCoteau v. District County Court, 420 U.S. 425, 444 (1975) (DeCoteau) and Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) (Rosebud), the same district court found that the purpose

of the Nelson Act was restoration of lands to the public domain. United States v. Minnesota, 446 F. Supp. 1382. The counties argue that because restoration of Indian reservation lands to the public domain is synonymous with disestablishment, see, e.g., Rosebud, 430 U.S. at 588-89 nn. 4 & 5, DeCoteau, 420 U.S. at 426-27, 446, 448-49, the interpretation of the Nelson Act affirmed in Red Lake Band directly conflicts with the major premise of Clark. This, they argue, is a significant legal change rendering collateral estoppel inapplicable.

We disagree. Assuming arguendo that the disestablishment issue is a question of law, the "legal change" exception to collateral estoppel is not available here because the court in Clark had DeCoteau, Rosebud, and United States v. Minnesota before it when it found that the Nelson Act had not disestablished the thirty-two townships. The Clark court applied the correct standard to resolve the disestablishment issue. Citing Rosebud and DeCoteau, the Clark court stated "the standard to be applied in resolving the disestablishment issue is whether a clear congressional intent to terminate the reservation is discernible either from the fact of the act, the surrounding circumstances, or the act's legislative history." 282 N.W.2d at 907. The court in Clark correctly found that Rosebud and DeCoteau were consistent with Leech Lake insofar as the standard used in resolving disestablishment issue. Therefore, the "legal change" exception to collateral estoppel is not applicable.

The counties next argue that the collateral estoppel bar should not be applied because the purposes of the doctrine are not met in this case. The counties argue that the court must now decide the disestablishment issue of the four ceded townships which is essentially the same issue that was decided in Clark because in both the court must rely on the Nelson Act and the same legislative and administrative interpretations of that Act. We disagree. Although the Nelson Act is relevant to both inquiries, the four townships are subject to different provisions of the Act, see I Kappler at 301, H.R. Exec. Doc. No. 247, 51st Cong., 1st Sess. 37 (1890), because no allotments of land to Indians were made in the four townships, White Earth Band v. Alexander, 518 F. Supp. at 533. Therefore, further inquiry into the status of the thirty-two township area would result in needless litigation. See Parklane Hosiery Co. v. Shore, 439 U.S. at 326.

The counties also claim that application of the collateral estoppel bar in the present case will result in inconsistent decisions because of the conflict in law underlying the interpretation of the Nelson Act. We disagree. Differing conclusions on the issue of disestablishment of particular reservations may result from different fact situations rather then differing interpretations of the law. Indian law is in a state of flux; however, reopening litigation of this particular disestablishment issue would not minimize the possibility of differing adjudications on disestablishment issues. The

Nelson Act treated various bands or tribes and reservations differently, Nelson Act, §§ 1, 3, I Kappler 301-03, 25 Stat. 642, 643, and contemplated that a separate agreement would be negotiated with individual bands or tribes pursuant to the Act. See I Kappler 301. When a court has determined disestablishment of a given reservation in its particular historical and factual setting, prevention of inconsistent adjudication becomes desirable insofar as it fosters reliance on judicial decision making.

We conclude that the district court did not abuse its discretion in finding that the counties had a full and fair opportunity to litigate their claims in Clark and are collaterally estopped from relitigating the question of disestablishment.

II. Reservation Status of the Four Northeastern Townships

Gaming rights are tied to the status of the four townships. If the four townships were ceded and never returned to reservation status, no Indian hunting and fishing rights exist within the four townships. In construing statutes which purportedly terminate the reservation status of any part of a reservation, the congressional intent to do so must be clear on the face of the statute, surrounding circumstances or legislative history, and doubtful expressions must be resolved in favor of the Indians. Rosebud, 430 U.S. at 586-87; DeCoteau, 420 U.S. at 444.

The four northeastern townships of the original Reservation were ceded to the United States by an

agreement executed July 20, 1889, between the Band and the United States pursuant to the Nelson Act.[5] Approximately 2,900 of the ceded 92,000 acres in the four townships were returned to trust status after the enactment of the Indian Reorganization Act. On appeal the Band argues that the entire acreage of the four townships was restored to reservation status because the Nelson Act was never carried out to completion;[6] therefore, subsequent history should be considered in determining the status of the land. The Band claims the Indian Reorganization Act was an attempt to rectify the mistakes of the Nelson Act and restore self-government to the Indians. The Band suggests that the authority to restore the four townships is contained in

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5. Pursuant to the Nelson Act, a Commission was appointed by the United States to negotiate with the Minnesota Chippewa Bands for cession of certain lands. The purpose of the Act was to assimilate Indians into non-Indian society by breaking up the reservation system. See H.R. Rep. No. 789, 50th Cong., 1st Sess. 6 (1888). The agreement provided the Band did "grant, cede, relinquish and convey to the United States all . . . [their] . . . right, title, interest in and to all and so much of said . . . Reservation as is not embraced in the following described boundaries . . ." (following is a description of the 32 townships excluding the northeastern four townships) H.R. Exec. Doc. No. 247, supra, at 37.

6. The Act was to effect a gradual transition from tribal relations to full emancipation. Wilbur v. United States ex rel. Kadrie, 281 U.S. 206, 211 (1930). This purpose has never been accomplished.

the Indian Reorganization Act. However, the Band cites no authority for the theory that the Reorganization Act impliedly restored land to reservation status and nothing in the Act supports its argument. The Band's interpretation of the Act would have immense nationwide consequence by creating new reservations out of lands long ceded. We reject that interpretation and conclude that if Congress had intended such a result it would have been explicit.

We also reject the Band's argument that the district court's holding will create an impractical checkerboard pattern of conflicting state and tribal jurisdiction within the Reservation which the Supreme Court stated was contrary to congressional intent in Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976). In Moe the Supreme Court interpreted Section 6 of the General Allotment Act, 24 Stat. 390, as amended 25 U.S.C. § 349, which provides that upon expiration of the trust patent period on allotted lands and the issuance of a patent in fee to an Indian, that land would become subject to state law. The Court in Moe held that the issuance of a fee patent under section 6 did not automatically take that piece of allotted land out of a currently existing reservation. 425 U.S. at 478. In contrast, the present case involves section 5 of the General Allotment Act which allows for the issuance of trust patents and for the cession of lands not allotted or needed for allotment upon terms agreed to by Congress. We conclude that Moe and its discussion of

checkerboard jurisdiction is not relevant to cession agreements which were intended to diminish reservations. Furthermore, checkerboard jurisdiction is not automatically contrary to congressional intent, see, e.g., Title 18 U.S.C. § 1151(b) (1976), which defines "Indian country" as "all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state." Weddell v. Meierhenry, 636 F.2d 211, 213 (8th Cir. 1980), cert. denied, 451 U.S. 941 (1981) (state has jurisdiction over Wagner, South Dakota even though it is located within the original Yankton Sioux Indian Reservation because it is not a dependent Indian community).

The district court found that United States v. Minnesota, 466 F.Supp. 1382, controlled the disposition of this issue. In United States v. Minnesota, the district court had earlier considered whether the Red Lake Band of Minnesota Chippewa Indians had relinquished their right, title and interest in lands ceded to the United States. That court examined the Nelson Act, its legislative history, the negotiations and relevant agreements in finding that all property rights in ceded lands had been terminated. The agreement signed by the Band in the present cases contains language identical

to that in the Red Lake Agreement.[7] The district court in the present case found that the legislative history, surrounding circumstances and subsequent history indicate the Reservation was diminished by the four northeastern townships.

On appeal the Band attempts to distinguish United States v. Minnesota on the basis that the Red Lake Reservation contained aboriginal lands while the White Earth Reservation was created by treaty and contained ceded lands. The Band does not indicate what legal difference that should make as far as the cession agreements are concerned and we conclude that there is none for purposes of this case.

The district court carefully analyzed the Nelson Act, its legislative history, subsequent history, negotiation transcripts, and the cession agreement and found that Congress and the Band intended to disestablish the four northeastern townships and that the Indian Reorganization Act restored only 2,900 acres to the reservation. We affirm based on our conclusion that there is no support for the Band's theory that the

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7. The agreement provided the Red Lake Band did "grant, cede, relinquish, and convey to the United States all . . . [their] . . . right, title, and interest in and to all and so much of said . . . Reservation as is not embraced in the following described boundaries . . ." H.R. Exec. Doc. No. 247, supra, at 28; United States v. Minnesota, 466 F. Supp. at 1385.

Reorganization Act impliedly restored the entire four townships to reservation status.

III. Tribal Sovereignty

The district court, relying on the test enunciated in White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) (Bracker), found that state regulation over non-members on trust lands located within the Reservation had not been preempted by federal law and did not impinge upon the Band's right of self government. Therefore, non-members hunting or fishing on trust lands within the Reservation are subject to licensing regulation by both the Band and the state.[8] On appeal the Band concedes that Bracker is the correct standard but argues that the district court erred in reaching the dual regulation on trust lands issue because it was not ripe. In support the Band asserts that the record was incomplete, that federal preemption on trust lands was not an issue in the case, the United States has not yet taken a position on the issue of federal preemption, and there was no examination of the Band's or the United States' activities with regard to wildlife resources on tribal lands. The Band requests this court to vacate the district court's judgment with respect to this issue so

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8. The Band has a 6-1/2 week deer season, the state's deer season is nine days long. The Band permits 150 antlerless deer to be killed, the state permits no killing of such deer. The Band also has longer seasons for hunting small game and trapping fur-bearing animals.

that it can develop a conservation program which it claims would be a relevant factor in a subsequent Bracker inquiry. In response the state argues that the issue was ripe noting that it had been placed before the court by the Band. We agree.

In its complaint the Band sought a declaration that it could enforce its regulations against anyone within the boundaries of the Reservation and that the state could not enforce state gaming laws against anyone anywhere, including on trust land, within the boundaries of the Reservation. The Band thereby presented the issue in its complaint and addressed the merits of state regulatory authority before the district court. As noted by the district court,

> We reject the Band's argument that we should decline to decide the narrower issues presented here pertaining to Indian owned and trust lands, and should await a more clearly defined controversy. This litigation is now seven years old; the interested parties are before the court; and both the Band and the State defendants have expressed a policy and intent to exercise regulatory authority over non-Indian hunting, fishing and wild rice gathering on Indian-owned and trust lands. The issues are squarely before this court; it is appropriate to render a decision.

White Earth Band v. Alexander, 518 F. Supp. at 534 n.4. We conclude that the district court properly reached this issue.

To determine state authority over non-member activities within the Reservation requires a particularized

inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law. Bracker, 448 U.S. at 145. The state has a strong legitimate interest in regulation of hunting and fishing because of its investment in and historic management of reservation game and fish resources. The Band's right to hunt, fish and gather wild rice is an attribute of its inherent sovereignty. The Band argues that the district court overvalued the state's interest and ignored signficant interests of the Band.

The district court applied Bracker's two-prong test to determine state authority: (1) whether the exercise of state authority has been preempted by federal law, and (2) whether the exercise of state authority unlawfully infringes on the Band's right to make its own laws and be ruled by them. Id. at 142. Considering the first prong, the district court appears to hold that the lack of direct evidence of a federal intent to preempt is fatal to the Band's argument. The Supreme Court, however, has rejected the notion that "an express Congressional statement" is necessary to find federal preemption. Id. at 144, citing Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685 (1965). The district court found that the Band's inherent sovereignty is "only" a backdrop in determining whether there has been federal preemption, citing Bracker. The Supreme Court, however, stated that tribal sovereignty is an "important

'backdrop,' against which vague or ambiguous federal enactments must always be measured." Bracker, 448 U.S. at 143 (citations omitted and emphasis added).

Under the second prong of the Bracker test, the district court found the Band would suffer no economic hardship from a dual license requirement because non-members would probably obtain both permits so as to be protected from the possibility of inadvertently hunting or fishing on Indian-owned or trust lands without the required permit. The district court also found that state jurisdiction over non-members in the reservation did not infringe on the right of the Band to make their own laws and be governed by them, citing Montana v. United States, 450 U.S. 544 (1981).

Although we think that the district court could have delved deeper into the interrelationship of the various state, federal, and tribal economic, conservation, revenue, and governmental policy interests, see White Mountain Apache Tribe v. Arizona, 649 F.2d 1274 (9th Cir. 1981), and would ordinarily be inclined to remand this issue for consideration of the "relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence," Bracker, 448 U.S. at 144-45, we conclude that a remand would serve no useful function here because the Band has not met its burden of showing that the state's gaming laws were unreasonable and unrelated to its regulatory authority. See Washington v.

Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 160 (1980).[9] Accordingly, we affirm the district court's judgment.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

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9. It should be noted that Congress could choose to preempt state authority, but there is no indication of an imminent federal enactment regarding preemption.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

White Earth Band of Chippewa Indians,

Plaintiff,

vs. Civ. 3-74-63

Joseph N. Alexander, individually and as Commissioner of Natural Resources for the State of Minnesota, and Fredean C. Hammer, Director of the Division of Enforcement and Field Service for the Department of Natural Resources

Defendants,

and

MEMORANDUM & ORDER

Counties of Mahnomen, Clearwater, and Becker,

Intervenor-Defendants,

and

Elmer H. Winter, Kenneth Albertson, Joe Klinkbomme, Ed Grahame,

Intervenor-Defendants,

United States of America,

Plaintiff,

vs. Civ. 3-74-305

State of Minnesota,

Defendant.

Kent P. Tupper and Peterson, Tupper & Smith, Walker, Minnesota, and Bernard P. Becker, St. Paul, Minnesota, attorneys for plaintiff White Earth Band of Chippewa Indians.

Thomas K. Berg, United States Attorney, Francis X. Hermann, Assistant United States Attorney, Minneapolis, Minnesota, John Jacobsen, Field Solicitor's Office, Washington, D.C., attorneys for United States of America.

Warren Spannaus, Attorney General of State of Minnesota, James M. Schoessler, Special Assistant Attorney General, St. Paul, Minnesota, attorneys for State of Minnesota and Minnesota Department of Natural Resources.

Alfred Schmidt, Bemidji, Minnesota, attorney for individual intervenor-defendants.

Tom D. Tobin, Winner, South Dakota, and David Albert Mustone, Washington, D.C., Tobin Law offices, attorneys for county intervenor-defendants.

This is an action brought by the White Earth Band of Chippewa Indians seeking declaratory relief to determine the Band's rights to hunt, fish, trap and gather wild rice on the White Earth Reservation without regulation or licensing by the defendants, and whether the Band has jurisdiction to regulate hunting, fishing, trapping, and wild rice gathering within the White Earth Reservation. The Band seeks permanent injunctive relief,

prohibiting defendants from enforcing hunting, fishing, trapping, and wild rice laws of Minnesota within the boundaries of the White Earth Reservation.

The action commenced by the Band was consolidated with a case filed by the United States seeking to prevent the State of Minnesota from enforcing its hunting, fishing, and trapping laws against Band and Chippewa Tribe members on the White Earth reservation. Three Minnesota counties and four individuals were permitted to intervene in the action brought by the Band.

The issues before us have been significantly narrowed during the pendency of this litigation. This action was held in abeyance by agreement of the parties and with the approval of this court while several of the issues were litigated in state court in the context of prosecutions of Indians or state hunting and fishing law violations on the White Earth Reservation. These prosecutions were consolidated on appeal before the Minnesota Supreme Court in State of Minnesota v. Clark, 282 N.W.2d 902 (Minn. 1979), cert. denied, 100 S.Ct. 1080 (1980) ("Clark").[1]

In Clark, the issue before the court was whether the state has jurisdiction to enforce its game and fish laws against enrolled members of the White Earth Band on non-Indian owned land within 32 of the 36 townships

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1. By agreement of the parties, the stipulated facts and exhibits from the Clark case are made part of the record herein.

within the White Earth Reservation as established by the Treaty of March 19, 1867, 16 Stat. 719, II Kappler 974 ("Treaty of 1867"). In affirming lower court dismissals of the prosecutions, the Minnesota court held that the White Earth Reservation was not disestablished by the Nelson Act of 1889, 25 Stat. 642, I Kappler 301 ("Nelson Act"), and thus that the state's jurisdiction over Indian hunting and fishing on the reservation was limited by P.L. 280, 18 U.S.C. § 1162(b). Id. at 908. The court further held that the Indians have aboriginal rights to hunt and fish that were extinguished by the Treaty of February 22, 1855, 10 Stat. 1165, II Kappler 685 ("Treaty of 1855"), but were later reacquired in the Treaty of 1867, and were never thereafter extinguished. Id. at 909. The Minnesota court concluded that the state is without jurisdiction over Indian hunting and fishing activities on the White Earth Reservation. Id.

Following the Clark decision, the Band moved to preclude defendants from relitigating the issue of whether the Nelson Act disestablished the White Earth Reservation. The court granted that motion by order dated May 30, 1980. The United States thereafter amended its complaint to seek no greater relief than that accorded by the Clark decision.

A recent decision of the United States Supreme Court has also narrowed significantly the issues before us. The Band has taken the position throughout this litigation that it has jurisdiction to regulate hunting, fishing, trapping, and wild rice gathering by non-members

on all reservation lands, including lands held in fee by non-Indians. In United States v. Montana, 101 S. Ct. 1245 (1981), the Court rejected a similar claim made by the Crow Tribe of Montana with reference to the Crow Reservation, holding that the Indians had no authority to regulate non-Indian hunting and fishing activities on non-Indian lands within the reservation. The parties agree that the Montana case disposes of the same issue as it is presented here.

Several issues remain. They are 1) whether the White Earth Reservation includes the four northeastern townships ceded to the United States in 1889 pursuant to the Nelson Act, and 2) whether the Band has jurisdiction to regulate hunting, fishing, trapping and wild rice gathering by non-members on land owned by or held in trust for the Band or individual Indians, and 3) whether the state has authority to regulate these activities on Indian-owned and trust land.

I. The Reservation Status of the Four Northeastern Townships

The rules of construction applicable to treaties and agreements involving land cessions between Indians and the government require that cession treaties and agreements be interpreted as the Indians understood them, and that doubtful expressions be resolved in favor of the Indians. See, e.g., Choctaw Nation v. Oklahoma, 397 U.S. 620, 630-31 (1970); Winters v. United States, 207 U.S. 564, 576 (1908). Likewise, in construing statutes that purportedly terminate the reservation status of any

part of an Indian reservation, congressional intent to do so must be clear, and doubtful expressions must be resolved in favor of the Indians. DeCoteau v. District County Court, 420 U.S. 425, 444 (1975) ("DeCoteau"); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 586-87 (1977). That congressional intent must " 'be expressed on face of the Act or be clear from the surrounding circumstances and legislative history.' " Id., quoting, Mattz v. Arnett, 412 U.S. 481, 505. This court does not however have a license to remake history where there are clear expressions of tribal and congressional intent. Id. at 447, 449.

The White Earth Band of Chippewa Indians is one of six Chippewa bands comprising the Minnesota Chippewa Tribe. The White Earth Reservation was established by the Treaty of 1867, and consisted of 36 townships of land in a square form, consisting of townships 141 through 146 North, Ranges 37 through 42 West, 5th Principal Meridian. The four northeastern townships[2] of the original reservation were ceded to the United States by an agreement made July 20, 1889 between the White Earth Band and the United States pursuant to the Nelson Act. The agreement provided that the band did "grant, cede, relinquish and convey to the United States all . . . [their] . . . right, title and interest . . " in those townships.

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2. Townships 146, 145, 144 and 143 North of Range

The four northeastern townships are comprised of approximately 92,000 acres. Following the Indian Reorganization Act of 1934, 48 Stat. 987, 25 U.S.C. § 476, aproximately 2,900 acres of these townships were returned to trust status. Clark Stipulation ¶ 37.

The Nelson Act was designed to accomplish an assimilation of the Indians into non-Indian society by breaking up the reservation system, and allotting lands in severalty to individual Indians. It was intended that unallotted lands would be sold. See H.R. Rep. No. 789, 50th Cong. 1st Sess. 6 (1888). This is consistent with the general policy of Congress at that time to encourage Indians to adopt an agricultural lifestyle, as evidenced by the enactment of the Dawes Act in 1887. See Act of Feb. 8, 1887, c. 119, 24 Stat. 388. The Nelson Act sought to effectuate this end by providing for the

> complete cession and relinquishment . . . of all . . . title and interest in and to all the reservations of . . . [the Chippewa Indians in the State of Minnesota] . . . except the White Earth and Red Lake Reservations, and to all and so much of these two reservations as . . . is not required to make and fill the allotments required by this and existing acts . . .

Cession and relinquishment were to be complete upon approval by the requisite number of Indians belonging to the respective reservations, and upon approval by the President. Id.

(cont.)

37 West.

The Act provided that cession and relinquishment of the reservations was to be negotiated by a commission appointed for that purpose. A three member commission, known as the Rice Commission, after member Henry M. Rice, was appointed in 1889.

The Rice Commission negotiated with both the Red Lake and the White Earth Bands of the Chippewa Indians for cession and relinquishment of certain lands. The Rice Commission was instructed by the Commissioner of Indian Affairs that, in implementing the provisions of the Nelson Act, the Commission was to accomplish the "full cession and relinquishment . . . to all and so much of the . . . White Earth . . . [reservation] . . . as in the judgment of the Commission is not required to make the allotments." Letter from Commissioner of Indian Affairs to Commissioners, May 24, 1889, Clark State Exhibit S-K. Those instructions also required that the Commissioners precisely define for the White Earth Indians the cession of any lands on the White Earth reservation:

> The boundaries of the tracts so reserved by you (the diminished White Earth and Red Lake Reservations) must be definitely determined and fixed and accurately described so that the Indians interested therein may be able to act intelligently and with a thorough knowledge as to just what and how much land they are parting with by cession and relinquishment to the United States, and in order that the deed of acceptance, cession and relinquishment may describe the cession in a manner that cannot be mistaken or misunderstood.

Id. at 11-13.

The transcripts of the negotiations between the Rice Commission and the Indians clearly reflect that the proposed cession of the four townships was fully considered by the Indians, and that it was understood that the reservation would be diminished by cession of those lands. See Transcript of Council at White Earth, July 17-29, 1880, House Exec. Doc. No. 247, 51st Cong. 1st Sess., 85-116 (1890), Clark State Exhibit SL.

In United States v. Minnesota, 466 F. Supp. 1382 (D. Minn. 1979), afirmed sub nom, Red Lake Band of Chippewa Indians, 614 F.2d 1161 (8th Cir.) cert. denied, 100 S. Ct. 279 (1980), this court considered whether the Red Lake Band of the Minnesota Chippewa Indians relinquished all their right, title and interest in lands ceded to the United States in 1889 and 1904. An examination of the language of the Nelson Act, its legislative history, the negotiations, and the subsequent construction given to the enactment and relevant agreements compelled a conclusion that all property rights of the Red Lake Indians in the ceded lands had been terminated. There, as here, the express language of the Nelson Act and its legislative history reveal a clear congressional intent to extinguish all property rights in the ceded lands.

Moreover, the negotiations conducted by the Rice Commission with the Red Lake Band in connection with the Red Lake cessions made it clear that no property

rights would survive in the ceded lands. Id. at 1387. The same commissioners subsequently communicated the same message to the White Earth Indians in connection with the cession of the four northeastern townships. That the intent was the same with regard to the four townships is manifested by a statement made by Commissioner Rice to the White Earth Band at the Sixth Council at White Earth on July 24, 1880:

> Now, should your present reservation be reduced: should some townships be taken off, that land will have the same status as the land just ceded at Red Lake. We are distinctly of the opinion that for your own safety and protection you should part with a small portion of this reservation. Power is given us under the act to reduce it if we see fit, but we are not going to exercise any power which would be injurious to you.

H.R. Exec. Doc. No. 247, supra at 96. The agreement ultimately signed by the White Earth Indians contained language identical to that found in the Red Lake agreement. Both agreements recited that the Indians "do hereby grant, cede, relinquish, and convey to the United States all our right, title, and interest in and to all and so much of said . . . Reservation as is not embraced in the following described boundaries . . . " Id. at 27, 38; see United States v. Minnesota, 466 F. Supp. at 1385.

The Band argues that the final draft of the Rice Commission Reports as it pertains to the White Earth Reservation does not accurately reflect the negotiations between the Band and the Rice Commission. The Band

offers as evidence early drafts of the proceedings during the councils at Red Lake, Bois Forte, Mille Lacs, Grand Portage, Gull Lake, Fond du Lac, Leech Lake, Cass Lake, White Oak Point, and Winnebagoshish. See Alexander Band Exhibits 16-35. These early drafts were found at the Regional Branch of the National Archives in Kansas City. If an earlier version of the White Earth Council exists, it could not be located.

The Band argues that the unedited earlier drafts contain substantial differences from the final report of the Commission, which were published as H. Exec. Doc. 247, 51st Cong., 1st Sess. (1890). These differences purportedly show that the final report did not accurately reflect the understanding of the Indians of the Nelson Act and the cession of reservation lands. The Band takes the position that these allegedly substantial differences compel a conclusion that the White Earth Indians never intended to cede all their right, title and interest in the four northeastern townships to the United States.

We have examined all early drafts of the Rice Commission Reports introduced by the Band. We do not agree that the differences between the early and final version of the Rice Commission Reports are substantial ones. Nor are we persuaded that any such differences support a conclusion that the White Earth Indians did not intend to unconditionally relinquish their interest in the four northeastern townships. The minor changes in the record of the Red Lake Council, which immediately preceded the White Earth Council, and involved a similar

cession of a portion of the Red Lake Reservation, and the record of the White Earth Council, which reflects a thorough airing of Indian concerns regarding the cession, convince us that the final version of the Rice Commission Report accurately reflects the understanding of the Indians with reference to the cession of the four northeastern townships. See Alexander Band Exhibits 15-17.

Neither does the subsequent construction of the enactments and agreements nor the subsequent treatment of the townships distinguish this case from the Red Lake land cessions. The Band's argument that the agreement ceding the four northeastern townships to the United States was conditional is not supported by the subsequent treatment nor history of those townships. No allotments of land in severalty to Indians were ever made in the four notheastern townships as they were on the other thirty-two townships comprising the Reservation. See Clark Stipulation ¶ 37. Annual Reports of the Department of the Interior indicate that federal government involvement with the four townships on behalf of the Indians was directed to carrying out the terms of the Nelson Act and cession agreement. See, e.g., House Exec. Doc. No. 5, 56th Cong., 2d Sess., LV-LVII (1900), Intervening Counties Exhibit CX-26; House Exec. Doc. No. 5, 58th Cong., 2d Sess., 296-97 (1903), Intervening Counties Exhibit CX-30.

Accordingly, we conclude that the language of the Nelson Act and the agreement ceding the four

northeastern townships to the United States was "precisely suited" to diminish the White Earth Reservation as established by the Treaty of 1867, see DeCoteau, 420 U.S. at 445, and that the legislative history, surrounding circumstances, and subsequent history clearly indicate that the four northeastern townships of the original reservation are no longer part of the White Earth Reservation.

II. Tribal Jurisdiction Over Hunting, Fishing, and Wild Rice Gathering on Indian Trust Lands.

The Band has conceded that the decision of the United States Supreme Court in United States v. Montana, 101 S.Ct. 1245 (1981) (hereinafter "Montana") controls disposition of the issue of Band jurisdiction over non-member hunting, fishing, and wild rice gathering on non-Indian owned fee lands within the reservation. Left for our consideration is the issue of Band authority over these activities by non-members of the Band[3] on lands owned by or held in trust for the Band or its individual members. It is also necessary to determine the nature and extent of state jurisdiction over hunting, fishing and

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3. We use the term "non-member" rather than "non-Indian." Indians who are not members of the Band stand on the same footing as non-Indians with regard to hunting, fishing, and wild rice gathering on the Reservation. See Washington v. Confederated Tribes of Colville, 100 S.Ct. 2069, 2085 (1980); Mescalero Apache Tribe v. State of New Mexico, 630 F.2d 724, 726, n.1 (10th Cir. 1980).

wild rice gathering activities of non-members on Indian-owned and trust lands.[4]

It is difficult to specify the exact quantity of land owned by or held in trust by the Band and its members. It is safe to say that it is a small percentage of the total Reservation. See Clark Stipulation ¶¶ 17, 30-32. Currently, of the 709, 500 acres originally held in trust for the Band in the thirty-two townships, 653,500 acres (92 percent) are not in trust status. In the four northeastern townships, no allotments were ever made. Some of the ceded lands in the four northeastern townships have been restored to trust status. A rice reserve has been established on these lands.

State v. Clark, 282 N.W.2d 902 (Minn. 1979), established that the Band has the right to hunt and fish free of state regulation on all reservation lands. These are aboriginal rights relinquished by the Treaty of 1855, but later reacquired by the Treaties of 1864 and 1867. Id. at 908. The Minnesota Court also recognized that

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4. We reject the Band's argument that we should decline to decide the narrower issues presented here pertaining to Indian-owned and trust lands, and should await a more clearly defined controversy. This litigation is now seven years old; the interested parties are before the court; and both the Band and the State defendants have expressed a policy and intent to exercise regulatory authority over non-Indian hunting, fishing, and wild rice gathering on Indian-owned and trust lands. The issues are squarely before this court; it is appropriate to render a decision.

these rights are a basic incident of reservation status. Id. at 909. These same principles apply to the rights of the Indians to gather wild rice. See id. at 909, n. 19; Mescalero Apache Tribe v. State of New Mexico, 630 F.2d 724, 729 (10th Cir. 1980); United States v. Finch, 548 F.2d 822, 832 (9th Cir. 1976), vacated on other grounds, 433 U.S. 676 (1977).

It is also true that the Band may condition or prohibit entry by non-members on Indian-owned and trust lands for the purpose of hunting, fishing and rice gathering by requiring compliance with permit requirements, seasons, limits, and rules regarding means of taking game, fish, and rice. This authority of the Band over non-members is grounded upon 18 U.S.C. § 1165,[5] its inherent right to exclude non-members from its lands, see Williams v. Lee, 358 U.S. 217, 219 (1959), and the Band's power to govern itself as granted by its Constitution. See Revised Constitution and Bylaws of

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5. 18 U.S.C. § 1165 provides,
Whoever, without lawful authority or permission, willfully and knowingly goes upon any land that belongs to any Indian or Indian tribe, band, or group and either are held by the United States in trust or are subject to a restriction against alienation imposed by the United States, or upon any lands of the United States that are reserved for Indian use, for the purpose of hunting, trapping or fishing thereon, or for removal of game, peltries, or fish therefrom, shall be fined not more than $200 or imprisoned not more than ninety days, or both, and all game, fish and peltries in his possession shall be forfeited.

the Minnesota Chippewa Tribe, Alexander Band Exhibit 37; United States v. Montana, 101 S.Ct. at 1254, aff'g in part, 604 F.2d 1162, 1165-66 (9th Cir. 1979); Quechan Tribe of Indians v. Rowe, 531 F.2d 408, 410-11 (9th Cir. 1976); People of the State of California v. Quechan Tribe of Indians, 424 F. Supp. 969, 974 (S.D. Cal. 1977), vacated on other grounds, 595 F.2d 1153 (9th Cir. 1979).

In exercising its authority to condition or refuse entry on Indian-owned and trust lands for the purpose of hunting, fishing and gathering, the Band may not assert criminal jurisdiction over non-members who violate conditions of entry on Indian-owned and trust lands. See Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). The Band's authority to regulate or prohibit these activities does not extend to application of the Conservation Code of the White Earth Indian Reservation to non-members by arrest of non-member violators, tribal court proceedings against non-members, imposition of fines, or forfeitures. See Clark Defendants' Exhibit 30.

In Quechan Tribe of Indians v. Rowe, 531 F.2d 408 (9th Cir. 1976), the court prescribed the limits of the Tribe's authority in regulating non-member hunting and fishing:

> These are the rights to determine who may enter the reservation; to define the conditions upon which they may enter; to prescribe rules of conduct; to expel those who enter the reservation without proper authority or those who violate tribal, state or federal law; to refer those who violate state or federal laws to state or federal

> officials; and to designate officials responsible for effectuating the foregoing.

Id. at 411. Moreover, the court held that forfeiture proceedings were quasi-criminal in nature, and thus the Tribe could not cause any non-member to forfeit property as a consequence of violating tribal law. Id., citing, One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 700 (1965).

In the Montana case, the Ninth Circuit held that the Crow Tribe had the authority to regulate hunting and fishing on the reservation within constraints of the Quechan decision, 604 F.2d at 1165. Insofar as the holding applied to land owned or held in trust for the Tribe, the Supreme Court readily endorsed it. See United States v. Montana, 101 S. Ct. at 1254.

Accordingly, we hold that, as to Indian-owned and trust lands within the White Earth Reservation, the Band may prohibit or condition entry by issuing and charging a fee for permits, setting limits and seasons, and prescribing permissible means of taking fish and game. We also hold that the Band may not proceed against non-members in tribal court, it may not arrest or search non-members, nor may it impose fines on non-members for violations of the Conservation Code. We hold that the Band's recourse for violations of conditions of entry by non-members is limited to suspension or revocation of permits and licenses, eviction of persons violating the Code from Indian-owned and trust lands and referral of

violators to federal authorities for prosecution under 18 U.S.C. § 1165.

III. State Authority to Enforce State Game and Fish Laws on Indian Owned and Trust Lands.

The Band has instituted a rather extensive conservation program. The Band has four full-time conservation officers, two conservation officer trainees, four conservation officer cadets, one full-time fish biologist, four staff persons to assist the fish biologist and a seven member ricing committee. In addition, the Minnesota Chippewa Tribe employs a water quality expert who is available to the Band, and the Band receives assistance from a Bureau of Indian Affairs Project Supervisor, and technical assistance from the United States Fish and Wildlife Service of the United States Department of the Interior, and the University of Minnesota Water Analysis facilities.

The State of Minnesota has a policy of enforcing Minnesota game and fish laws against non-Indians on all lands within the White Earth Reservation. Clark Stipulation ¶ 43. The State does not, however, claim that it otherwise actively manages wildlife resources on Indian-owned or trust lands.

The issue of state authority over non-member activities on trust lands requires a "particularized inquiry into the nature of State, Federal, and tribal interests at stake, and inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." White Mountain Apache Tribe v.

Bracker, 100 S.Ct. 2578, 2584 (1980) (hereinafter "Bracker"). This inquiry is guided by consideration of whether the state exercise of authority has been preempted by federal law, and whether the exercise of state authority may unlawfully infringe on the right of the Band to make its own laws and be ruled by them, Bracker, 100 S.Ct. at 2583. Either of these standards standing alone are sufficient to make state law inapplicable on Indian land. Id. Congressional expressions of intent with regard to self government must be read against the "backdrop" of deeply held traditional notions of Indian self government. Id. quoting, McClanahan v. State Tax Commission of Arizona, 411 U.S. 164, 172 (1973).

Indian tribes retain attributes of sovereignity over both their members and their territory. Bracker, 100 S.Ct. at 2583. It is because of the "unique historical origins or [sic] tribal sovereignity" that different principles apply in analyzing the preemption of state law on Indian lands. Id. It is difficult to conceive of a subject matter in which the Indian tribes would have a stronger traditional interest than in hunting, fishing, and food gathering. See United States v. Winans, 198 U.S. 371, 381 (1905). In this instance, it has already been established for the purposes of this litigation that the Band has aboriginal rights, reestablished by treaty to engage in these activities. See Clark, 282 N.W.2d at 909.

There is also a "significant geographical component" of tribal sovereignity which has been deemed

by the Supreme Court to be "highly relevant" to any preemption analysis. Bracker, 100 S.Ct. at 2587. In this case, this factor weighs in favor of the Band, given the Indian ownership or trust status of the lands in question.

The federal government has expressed a policy of encouraging tribal self government and economic development and self sufficiency. See Indian Reorganization Act of 1934, 48 Stat. 987, 25 U.S.C. § 476; Indian Financing Act of 1974, 88 Stat. 77, 25 U.S.C. § 1451 et. seq. In this instance, the Band also receives assistance from both the Bureau of Indian Affairs and the Fish and Wildlife Service of the Department of the Interior in administering its comprehensive program of conservation management and regulation. It is noteworthy, however, that the United States has never taken the position in this lawsuit that state law has been preempted with regard to non-Indian hunting and fishing anywhere within the Reservation. Nor do we find any direct evidence of a federal intent to preempt state hunting and fishing laws in any federal statute or the applicable treaties. Nor is this a case where federal involvement in Indian conservation efforts points to a federal intention to preempt the State from any authority. Compare Bracker, 100 S.Ct. at 2584-85.

We now examine the State's interest in applying its game and fish laws to non-members on Indian-owned and trust lands. While the State has historically been extensively involved in fish and wildlife management and

regulation within the White Earth Reservation, the State does not assert that it provides such services on Indian-owned and trust lands. Given the checkerboard nature of the distribution of trust and Indian-owned lands within the Reservation, and the relatively small amount of Indian-owned and trust lands, the State's interests in uniform wildlife management are not solely limited to those lands on which it has directly exercised this function. The Indian-owned and trust lands, not the subject of Band conservation efforts until relatively recently, have undoubtedly benefited from the State's efforts in this area.

We conclude that the State has a stronger interest in this instance in the regulation of hunting, fishing, and wild rice gathering by non-members on the Indian-owned and trust lands. Although it is clear that the right of the Band to hunt and fish and gather rice is an attribute of their inherent sovereignty, that sovereignty serves only as a backdrop in determining whether federal law has preempted the application of state law in this instance. See Bracker, 100 S.Ct. at 2582. We find no such federal expression of an intent to preempt in this instance.

We must still consider the second prong of the Bracker test: whether the exercise of state authority may unlawfully infringe on the right of the Band to make its own laws and be governed by them. Id. Dual regulatory systems, as opposed to dual systems of taxation, will always be in conflict to some extent. See

Mescalero Apache Tribe v. State of New Mexico, 630 F.2d at 730. The inquiry must focus on whether the conflicts infringe on the Band's right to govern itself.

There are conflicts between the State and Band regulatory schemes.[6] But to the extent that conditions set on hunting, fishing, and rice gathering by non-members are more stringent than those imposed by State law, the provisions of 18 U.S.C. § 1165 mandate that these conditions may be imposed on non-members.

With this qualification, we discern no impingement on the right of the Band to govern its members and its internal relations by a State exercise of authority over non-member hunting and fishing. We are not persuaded that the imposition of a dual license requirement on non-members would result in any economic hardship to the Band because of non-member reluctance to utilize Indian-owned and trust resources. The record does not support any such conclusion. In view of the geographic distribution of Indian-owned and trust lands in this instance, the likelihood is greater that a non-member would purchase a tribal permit to protect himself from

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6. Compare Conservation Code of the White Earth Indian Reservation, Clark Defendants' Exhibit 30 with Minn. Stat. Ch. 97, 98. An example of clear conflict between the two regulatory schemes is the Band's provision that no person shall be required to possess a Minnesota fishing or hunting license while engaging in these activities on the Reservation. See Conservation Code, supra at ¶¶ 22.05, 32.03.

the possibility of inadvertently hunting or fishing on the Indian-owned and trust lands without the required permit. It is also likely that, given the vast resources in Minnesota for hunting and fishing, many non-members choosing to hunt or fish on Indian-owned land would have a Minnesota license in any case. Nor is there any evidence that the enforcement of State fish and game laws against non-members would disrupt the conservation efforts of the Band.

After carefully considering the interests of the federal government, the Band, and the State, we conclude that there is no federal intent to preempt the exercise of State authority over non-member hunting, fishing, and rice gathering on Indian-owned and trust lands, nor will the exercise of State authority infringe on the Band's right of self-government.

Accordingly, we declare that: 1) The White Earth Band of Chippewa Indians is entitled to hunt, fish, and gather wild rice on the White Earth Reservation without interference from or regulation by the State of Minnesota; 2) the White Earth Reservation, as established by the Treaty of 1867, was diminished by the cession of the four northeastern townships of the White Earth Reservation by an agreement between the White Earth Band and the United States dated July 20, 1889; 3) the White Earth Band has the statutory right to condition entry by non-members of the Band for the purposes of hunting, fishing and wild rice gathering on lands owned by the Band and its individual members and lands held

in trust for the Band or its members by the United States. The State of Minnesota is permanently enjoined from enforcing its game and fish laws on the White Earth Reservation against members of the White Earth Band. The Band's request that the State of Minnesota be permanently enjoined from enforcing its game and fish laws against non-members of the Band anywhere within the White Earth Reservation is DENIED.

Dated: June 25, 1981.

EDWARD J. DEVITT, Senior Judge
United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

White Earth Band of Chippewa Indians,

Plaintiff,

vs. Civ. 3-74-63

Robert L. Herbst, Individually and as Commissioner of Natural Resources for the State of Minnesota, Jerome Liemandt, Chief of Enforcement and Field Services for the Department of Natural Resources, James Goltz, conversation officer for the Department of Natural Resources, individually and as conservation officer, and Dennis Huwe, conservation officer for the Department of Natural Resources, individually and as conservation officer,

Defendants;

(and) MEMORANDUM & ORDER

Counties of Becker, Mahomen and Clearwater,

Intervenors,

(and)

Elmer H. Winter, Kenneth Albertson, Joe Klinkbomme, Ed Grahame,

Also Intervenors.

(and)

United States of America,

Plaintiff,

vs. Civ. 3-74-305

State of Minnesota,

Defendant.

Kent Tupper, Walker, Minnesota, and Bernard Becker, St. Paul, Minnesota, attorneys for White Earth Band of Chippewa Indians.

Thomas K. Berg, United States Attorney, Francis, Hermann, Assistant United States Attorney, Minneapolis, Minnesota, attorneys for United States of America.

Warren Spannaus, Attorney General, James Schoessler, Special Assistant Attorney General, St. Paul, Minnesota, attorneys for State of Minnesota and individual defendants.

Alfred Schmidt, Bemidji, Minnesota, and David Mustone, Washington, D.C., attorneys for intervening defendants.

Plaintiff, the White Earth Band of Chippewa Indians, moves for an order precluding relitigation of the issues decided by the Minnesota Supreme Court in the recent case of State v. Clark, 282 N.W.2d 902 (Minn. 1979). In Clark the Minnesota Supreme Court held that the state was without authority to regulate hunting and fishing activities of Chippewa Indians in 32 Minnesota townships within the White Earth Reservation. When Clark was being litigated the present case, raising the same issues but involving four additional townships, was

pending in this court. The parties agreed to stay this federal action and litigate the issues with respect to the 32 townships in state court in the Clark lawsuit. All the parties to this federal action, including the intervening defendant counties, participated actively in the Clark litigation in state court. All the parties except the intervening counties now agree that Clark is binding on the parties and on this court with respect to the 32 townships involved in Clark.

The principal issue is whether relitigation of the issues involved in Clark is barred by principles of collateral estoppel - issue preclusion. All parties agree that the technical requirements of issue preclusion are satisfied, since all the parties participated in the state action, the issues were fully and fairly litigated, the state court action resulted in a valid and final judgment, and the resolution of the issues was essential to that judgment. See, e.g., Restatement (Second) of Judgments, § 68 (Tent. Draft No. 4, 1977); Parklane Hosiery Co. v. Shore, 99 S.Ct. 645, 649 n.5 (1979). The intervening counties' position is that, although the technical requirements of collateral estoppel are satisfied, this court in its discretion should nonetheless permit relitigation. This position apparently is premised on the argument that there is intervening case law which the Minnesota Supreme Court in Clark did not consider, in particular the United States Supreme Court cases of Rosebud Sioux Tribe v. Kneip, 97 S.Ct. 1361 (1977) and DeCoteau v. District County Court, 95 S.Ct. 1082 (1975),

and this court's decision in United States v. Minnesota, 446 F. Supp. 1382 (D. Minn. 1979). The problem with this argument is that all these cases predate Clark and in fact were considered by the Minnesota Supreme Court when it decided Clark. Therefore, the intervening counties in effect are merely asking this court to review the decision of the Minnesota Supreme Court. That is the task of the United States Supreme Court, not this court. This court is satisfied that the issues with respect to the 32 townships were fully and fairly litigated in Clark and should not be relitigated in this case.

There is a second, independent reason for granting the White Earth Band's motion. This court in effect abstained from deciding the status of the 32 townships, deferring to the state courts. Although this was done pursuant to agreement by the parties, the effect was the same as traditional Pullman-type abstention. See, e.g., Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941). Under the Pullman abstention doctrine the parties, if they without reservation submit their federal claims to the state tribunal for resolution, are precluded from relitigating those issues in the federal action, but rather their exclusive federal avenue of relief is by appeal to the Supreme Court. See, e.g., England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964). Consequently, under basic abstention

principles the issues decided in Clark cannot be relitigated in this case.[1]

Plaintiff's motion for issue preclusion is GRANTED. The parties also are directed to appear before this court on June 23, 1980, at 9:00 A.M., for a status conference concerning the issues remaining to be resolved.

Dated: May 30, 1980

EDWARD J. DEVITT, Chief Judge
United States District Court

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1. The intervening counties also make the rather interesting request that this court permit them to relitigate the general issue of reservation disestablishment, without reconsidering the more particular question of hunting and fishing rights decided in Clark. The granting of this request, of course, would run directly counter to the command of Art. III of the Constitution, that federal courts decide only cases or controversies, not hypothetical, abstract questions. In this case the controversy alleged in the complaint concerns hunting and fishing rights and the court cannot render an advisory opinion disconnected from that controversy.

ACT OF JANUARY 14, 1889, 25 STAT. 642
(THE NELSON ACT)

CHAP. 24 - An act for the relief and civilization of the Chippewa Indians in the State of Minnesota.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That the President of the United States is hereby authorized and directed, within sixty days after the passage of this act, to designate and appoint three Commissioners, one of whom shall be a citizen of Minnesota, whose duty it shall be, as soon as practicable after their appointment, to negotiate with all the different bands or tribes of Chippewa Indians in the State of Minnesota for the complete cession and relinquishment in writing of all their title and interest in and to all the reservations of said Indians in the State of Minnesota, except the White Earth and Red Lake Reservations, and to all and so much of these two reservations as in the judgment of said commission is not required to make and fill the allotments required by this and existing acts, and shall not have been reserved by the Commissioners for said purposes, for the purposes and upon the terms hereinafter stated: and such cession and relinquishment shall be deemed sufficient as to each of said several reservations, except as to the Red Lake Reservation, if made and assented to in writing by two-thirds of the male adults over eighteen years of age of the band or tribe of Indians occupying and belonging to such reservations; and as to the Red Lake Reservation the cession and relinquishment shall be deemed sufficient if made and assented to in like manner by two-thirds of the male adults of all the Chippewa Indians in Minnesota; and provided that all agreements therefor shall be approved by the President of the United States before taking effect; Provided further, That in any case where an allotment in severalty has heretofore been made to any Indian of land upon any of said reservations, he shall not be deprived thereof or disturbed therein except by his own individual consent separately and previously given, in such form and manner as may be prescribed by the Secretary of the Interior. And for the purpose of ascertaining whether the proper number of Indians yield and give their assent as aforesaid, and for the

purpose of making the allotments and payments hereinafter mentioned, the said commissioners shall, while engaged in securing such cession and relinquishment as aforesaid and before completing the same, make an accurate census of each tribe or band, classifying them into male and female adults, and male and female minors; and the minors into those who are orphans and those who are not orphans, giving the exact numbers of each class, and making such census in duplicate lists, one of which shall be filed with the Secretary of the Interior, and the other with the official head of the band or tribe; and the acceptance and approval of such cession and relinquishment by the President of the United States shall, be deemed full and ample proof of the assent of the Indians, and shall operate as a complete extinguishment of the Indian title without any other or further act or ceremony whatsoever for the purposes and upon the terms in this act provided.

* * *

Sec. 3. That as soon as the census has been taken and the cession and relinquishment has been obtained, approved, and ratified, as specified in section one of this act, all of said Chippewa Indians in the State of Minnesota, except those on the Red Lake Reservation, shall, under the direction of said commissioners, be removed to and take up their residence on the White Earth Reservation, and thereupon there shall, as soon as practicable, under the direction of said commissioners, be allotted lands in severalty to the Red Lake Indians on Red Lake Reservation, and to all the other of said Indians on White Earth Reservation, in conformity with the act of February eighth, eighteen hundred and eighty-seven, entitled "An act for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes"; and all allotments heretofore made to any of said Indians on the White Earth Reservation are hereby ratified and confirmed with the like tenure and condition prescribed for all allotments under this act: Provided, however, That the amount heretofore allotted to any Indian on White Earth Reservation shall be deducted from the amount of allotment to which he or she is entitled

under this act: Provided further, That any of the Indians residing on any of said reservations may, in his discretion, take his allotment in severalty under this act on the reservation where he lives at the time of the removal herein provided for is effected, instead of being removed to and taking such allotment on White Earth Reservation.

* * *

Approved, January 14, 1889.